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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WOLFGANG VEITFAVELA, Defendant and Appellant.	B208016 (Los Angeles County Super. Ct. No. NA075288)

APPEAL from a judgment of the Superior Court of Los Angeles County, John David Lord, Judge. Affirm in part, reverse in part and remand with directions.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Wolfgang Veitfavela was convicted after a jury trial on a variety of felony charges arising from a confrontation with his perceived rival for his girlfriend's affections. On appeal, Veitfavela does not challenge his convictions for assault with a firearm, residential burglary, possession of a firearm, and false imprisonment. However, Veitfavela contends he was improperly convicted of second degree robbery and attempted residential robbery. The parties are in agreement the sentence enhancement for personal use of a firearm as to the false imprisonment conviction must be stricken. We affirm in part, reverse in part and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Crimes Committed by Veitfavela*

Paola Garcia and Phillip Gurule dated briefly in 2006 before Veitfavela became her boyfriend. Veitfavela grew jealous of Gurule, who remained in contact with Garcia. Gurule did not know Veitfavela or about his relationship with Garcia.

On the night of August 2, 2007, Gurule was in the hallway outside his condominium unit when Veitfavela ordered him at gun point to open the front door and to go inside. Gurule resisted by asking Veitfavela what he wanted. Veitfavela repeated his demands. Gurule then offered to hand over his money or his wallet. Veitfavela answered, "Yeah, give me your money." Gurule surrendered $20, his driver's license, student identification and two credit cards.

Veitfavela was still pointing his gun, so Gurule asked him what else he wanted. Veitfavela said he wanted Gurule's laptop computer. Gurule showed Veitfavela the front door keys and told him where to find his laptop computer. However, Veitfavela said he would not enter the unit without Gurule, who continued to resist accompanying Veitfavela inside. After about 30 seconds to two minutes more of discussion, Veitfavela became "frustrated." He extended the arm of his gun hand and threatened to shoot, prompting Gurule's agreement to accompany him inside. Veitfavela unlocked the front door and used his gun hand to turn on a light inside the unit. Realizing the gun was no longer trained on him, Gurule turned and fled down a nearby stairwell. Veitfavela gave chase, but Gurule managed to escape from the building.

2. *The Information*

Veitfavela was charged in a six-count second amended information with second degree robbery (Pen. Code, § 211)[1] (count 1); assault with a firearm (§ 245, subd. (a)(2) (count 2); first degree residential burglary (§ 459) (count 3); possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 4); attempted first degree residential robbery (§§ 211, 664) (count 5) and attempted kidnapping for robbery (§§ 209, subd. (b), 664) (count 6). The information further alleged as to counts 1, 3, 5, and 6, that Veitfavela personally used a firearm (§§ 12022.5, subd. (a); 12022.53, subd. (b)). Veitfavela pleaded not guilty and denied the special allegations.

3. *The Trial, Jury's Verdict and Sentence*

At trial, Veitfavela testified in his own defense he confronted Gurule solely to force him to reveal e-mail correspondence with Garcia; he denied intending to steal from Gurule. Veitfavela claimed he used a novelty lighter that resembled a firearm to intimidate Gurule, but he never threatened to shoot him.

The jury convicted Veitfavela of counts 1 through 5 and acquitted him of count 6, but found him guilty of the lesser included offense of false imprisonment. As to counts 1, 3, 5 and 6, the jury also found true the accompanying special allegation he used a firearm. Veitfavela was sentenced to an aggregate state prison term of 14 years: four years (the middle term) for residential burglary (count 3) and 10 years for the firearm-use enhancement. The court also imposed a concurrent term of three years (the middle term) for second degree robbery (count 1). Sentence as to the remaining counts and enhancements was ordered stayed pursuant to section 654.

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[1] Statutory references are to the Penal Code.

DISCUSSION

1. *Robbery and Attempted Robbery Convictions*

Veitfavela argues he was improperly convicted of both second degree robbery in count 1 and attempted residential robbery in count 5 because the two offenses arose out of the same continuous course of conduct.

In *People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227, the California Supreme Court explained the current state of the law pertaining to multiple convictions: "In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged.' (§ 954, italics added; *People v. Ortega* (1998) 19 Cal.4th 686, 692 . . . .)' (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034 . . . .) Section 954 generally permits multiple conviction. Section 654 is its counterpart concerning punishment. It prohibits multiple punishment for the same 'act or omission.' When section 954 permits multiple conviction, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. (*People v. Ortega, supra,* at p. 692; *People v. Pearson* (1986) 42 Cal.3d 351, 359-360 . . . .) [¶] A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' (*People v. Montoya, supra,* 33 Cal.4th at p. 1034.) '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' (*People v. Lopez* (1998) 19 Cal.4th 282, 288 . . . .)" (Accord, *People v. Sloan* (2009) 42 Cal.4th 110, 116.)

In this case, we do not understand Veitfavela to argue that one of the two offenses is a lesser included offense of the other. Multiple punishment is not an issue because the trial court stayed execution of sentence on the attempted residential robbery conviction. In view of the Supreme Court's interpretation of section 954, Veitfavela's challenge to the multiple convictions on counts 1 and 5 is without merit. (See e.g., *People v. Benevides* (2005) 35 Cal.4th 69, 97 [defendant could be convicted of lewd and lascivious

conduct, rape and sodomy where evidence supporting convictions was the same]; *People v. Washington* (1996) 50 Cal.App.4th 568, 578-579 [two unauthorized entries of same apartment within hours supported separate burglary convictions].)

Significantly, the cases cited by the parties did not actually pertain to the issue of multiple convictions under section 954. *People v. Brito* (1991) 232 Cal.App.3d 316, 326 concerned instructions on lesser included offenses; *People v. Irvin* (1991) 230 Cal.App.3d 180, 184 involved convictions of both the greater and lesser offenses; and *People v. Porter* (1987) 194 Cal.App.3d 34, 38 considered the application of section 654, not section 954.

As for Veitfavela's reliance on *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1309 (*Marquez*), that case discussed the so-called "single larceny doctrine" as stated in *People v. Bauer* (1969) 1 Cal.3d 368 (*Bauer*), where the defendant entered the victims' house, took numerous items of personal property which he loaded into one of the victims' cars, and then took the car to effect an escape. The defendant challenged the trial court's decision to punish him for both the robbery and auto theft. Interpreting section 654, the Supreme Court explained that "where a defendant robs his victim in one continuous transaction of several items of property, punishment for robbery on the basis of the taking of one of the items and other crimes on the basis of the taking of the other items is not permissible." (*Bauer, supra*, 1 Cal.3d at p. 377.) Significantly, the Attorney General argued in *Bauer* that separate punishment was appropriate because the defendant formed the intent to steal the car only after the other items had been taken. The *Bauer* court rejected this contention: "The fact that one crime is technically complete before the other commenced does not permit multiple punishment where there is a course of conduct comprising an indivisible transaction. [Citations.] And the fact that one of the crimes may have been an afterthought does not permit multiple punishment where there is an indivisible transaction." (*Ibid.*)

In *Marquez*, our colleagues in the Third District Court of Appeal applied the larceny doctrine to multiple convictions in determining the defendant was erroneously convicted on two counts of robbery based on his theft of a waitress's tips and the money

from the restaurant's cash drawer, because "[t]his was an indivisible transaction involving a single victim who was forced to relinquish possession of two separately owned amounts of money at the same place and at the same time." (*Marquez, supra,* 78 Cal.App.4th at p. 1307.) The present case is factually distinguishable from *Marquez* because the evidence showed Veitfavela engaged in two separate criminal acts – a completed taking of several items by force in the hallway, followed by a "stand-off" with the resistant victim, and then an attempted taking of an item by force from inside the residence – rather than in "one seamless ill-conceived effort" to force his victim to relinquish possession of two items nearly simultaneously. (*Ibid.*) In any event, we do not read *Bauer* as applicable to prohibit convictions under section 954.

2. *Firearm-Use Enhancement as to Count 6*

The jury acquitted Veitfavela of count 6, attempted kidnapping for robbery, but found him guilty of the lesser included offense of false imprisonment. The jury also found true he personally used a firearm (§ 12022.53, subd. (b)) in the commission of the offense. Sentence was imposed and stayed under section 654.

Veitfavela contends and the People acknowledge false imprisonment (§ 236) is not one of the enumerated offenses under section 12022.53, subdivision (a) that would justify an enhanced punishment for personally using a firearm, and therefore the 10-year enhancement must be stricken. (See *People v. McGee* (1993) 15 Cal.App.4th 107, 117*; People v. Pena* (1999) 74 Cal.App.4th 1078, 1089.)

3. *Correction of Clerical Error*

The reporter's transcript and the clerk's transcript conflict in one respect. After sentencing Veitfavela for residential burglary (count 3), the trial court orally imposed the middle term of three years for second degree robbery (count 1) to be served concurrently with the four-year term for residential burglary. Sentence as to the remaining counts and enhancements was stayed. However, the abstract of judgment erroneously indicates the sentences on all counts other than count 3 were stayed; and the clerk's minute order mistakenly reflects a one-year term (one-third the middle term) was imposed on count 1 and stayed under section 654.

We order the correction of these clerical errors. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [record of court's oral pronouncement controls over clerk's minute order]; *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187 [appellate court may correct clerical errors on its own motion or upon application of the parties]; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1075-1081 [reporter's transcript controls]; see also *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

DISPOSITION

The judgment is reversed and remanded for the trial court to strike the unauthorized section 12022.53, subdivision (b) enhancement as to count 6, the conviction for false imprisonment. The abstract of judgment and the clerk's minute order are ordered corrected to reflect the proper sentence on count 1 and accompanying firearm-use enhancement under section 12022.53, subdivision (b). The trial court shall forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.